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NO. 439

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963.

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RADIANT BURNERS, INC., an Illinois corporation,
Petitioner,

vs.

AMERICAN GAS ASSOCIATION; PEOPLES GAS LIGHT AND COKE COMPANY; NORTHERN ILLINOIS GAS COMPANY; et al.,

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals is reported at 320 F.2d 314.

### STATEMENT

The facts of this case are fully and accurately set forth in the opinion of the court below, printed in the Appendix to the Petition, 1a-7a.

### QUESTION PRESENTED

The question presented is whether the attorney-client privilege is available to corporate clients.

## ARGUMENT

1. Apart from the decision of the district judge in this case, no judge, trial or appellate, so far as we have been able to discover, has ever doubted that the attorney-client privilege applies to corporations. At least 56 reported decisions[1] (including those of this Court, three courts of appeals, and 29 district judges) have treated the privilege as applicable to corporations, and the same must have been true in countless unreported cases. The Court of Appeals, *en banc* and unanimously, has now reversed the District Court's decision and upheld the privilege. No other district judge has expressed agreement with the District Court's decision, and four have disagreed.[2] Indeed, none of the commentators cited by petitioner as opposed to the attorney-client privilege has taken the position that if there is such a privilege it should not apply to corporations.

The district judge himself said that "it is ridiculous to say that the corporation should not have such a privilege" (App. 18). In his second opinion, he declared (App. 38) that it was his:

> "... own considered judgment that due to the large and complex nature of modern corporate business transactions corporation should in fact be entitled to the attorney-client privilege."

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1. See cases cited in fn. 7 of the opinion below (petition, pp. 9a-11a) and *American Cyanamid Company v. Hercules Powder Company*, 211 F.Supp. 85 (D. Del. 1962); *Garrison v. General Motors Corporation*, 213 F.Supp. 515, 521 (S.D. Cal., 1963); *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa. 1962); *8 in 1 Pet Products v. Swift & Co.*, 218 F.Supp. 253 (S.D.N.Y., 1963); *United States v. Becton-Dickinson & Co.*, 242 F.Supp. 92 (D.N.J., 1962); *Paper Converting Mach. Co. v. FMC Corp.*, 215 F.Supp. 249 (E.D. Wis., 1963); *Atlas Heating & Ventilating Co. v. Superior Court*, 25 Cal. Rep. 522 (Dist. Ct. App. 1962).

2. See the first four cases cited in fn. 1, *supra*.

The District Court sought appellate guidance which he has now received. The temporary uncertainty in the law created by the decision of the District Court has now been removed and there is no further need for review.

2. Judge Campbell thought that the body of authority which accorded corporations the privilege was not authoritative because in no case prior to his decision had any party put the question in issue by denying that the privilege was available to corporations. In many of the cases it is obvious, however, that the courts were aware that they were dealing with corporations; they were concerned with problems which arose only because the client was a corporation. But, apart from that, where the absence of a case in which a point is specifically contested results from a general, consistent and uniform understanding as to what the law is, it cannot be said that there is no law on the subject. Just as there has been no case in which the applicability of the privilege to corporate clients has been challenged, so also there has been no case in which the applicability of the privilege to an individual, as opposed to a corporation or association, has been challenged. Judge Campbell's concept of the law, which as a matter of logic would deny the privilege to anyone, is obviously untenable; the purpose underlying the privilege is equally served whether it is available to a man, a woman, a child, a corporation or an association, no one of which has ever been singled out for particular consideration in respect to the privilege.

3. The statutes of 38 states[3] and the definitions in treatises and decisions define the privilege as that of the

3. The statutes are collected in 8 Wigmore, *Evidence* (McNaughton Rev. 1961) § 2202 pp. 555-559. Other definitions appear in 8 Wigmore, p. 554; *United States* v. *United Shoe Machinery Co.*, 89 F. Supp. 357, 358 (D. Mass. 1950). See also the Model Code of Evidence and the Uniform Rules of Evidence, discussed at pp. 4-5, *infra*.

"client" with no differentiation between individual and corporate clients. These statutes have been treated by the courts as declaratory of the common law rule. *Baird v. Koerner*, 279 F.2d 623, 629 (C.A. 9, 1960); *United States v. Kovel*, 296 F.2d 918, 921 (C.A. 2, 1961); 8 Wigmore, *Evidence* (McNaughton Rev. 1961), § 2292 pp. 555-557; 97 C.J.S. 783. The statutes reflect the opinion of the policy-making bodies in three-quarters of the states that the privilege, without restriction as to the nature of the client, is in the public interest and not an historical anachronism.[4]

Both the Model Code of Evidence, published by the American Law Institute in 1942, and the Uniform Rules of Evidence, issued by the National Conference of Commissioners on Uniform State Laws in 1953, specifically define "client," for purposes of the privilege, as including a "corporation or other association."[5] The Comment on the Model

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4. That the privilege reflects a felt need of society and not merely an historical development of the common law is demonstrated by the fact that it exists in civil as well as common law countries. E.g., France: Penal Code, § 378; Decree of April 10, 1954, Article 41. Cass. 11 mai 1844, S. 1844. 1. 527; Cass. 24 mai 1862, S. 1862. 1. 995, D. 1862. 1. 545; Poitiers, 31 decembre 1918, D. 1920. 2. 59, note Savatier; Cass. 20 mai 1899, S. 1901. 1. 64, D. 1900. 1. 25; 28 octobre 1899, S. 1902. 1. 302; Rouen, 17 decembre 1858, P. 1859. 2. 63; Lyon, 17 octobre 1952, Gaz. Pal. Tables, 1953, 1. V° Secret Prof. n°s 4 et 5. Germany: Code of Civil Procedure, Article 383, Code of Criminal Procedure, Articles 53, 300. Stein-Jonas-Schönke, Kommentar zur ZivilprozeBordnung, 18th ed., Vol. 1, art. 383, note III 2a; Wieczorek, Zivilproze, Bordnung, 1957, Vol. II part. 2, art. 383 note C III e 2.

5. Rule 209 of the Model Code begins:

> "As used in Rules 210 to 213, (a) 'client' means a person *or corporation or other association* that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service from him in his professional capacity; . . ." (Emphasis supplied.)

Rule 26(3) of the Uniform Rules of Evidence contains the same

Code shows that except when otherwise indicated—as it has not been for the attorney-client privilege—the codifiers understood their definitions to be a restatement of existing law. Model Code of Evidence, p. VII.[6] Indeed, Professor Morgan, who was, and apparently still is, unenthusiastic about the privilege and who could not be charged with attempting to enlarge it *sub silentio*, stated that in the Model Code "the essential features of the common law privilege are preserved." Model Code, p. 28.

These codifications are significant not merely as restatements of the law. They were prepared as recommended legislation, and they were meant to represent the best modern thought as to what the law should be. Their authors constituted a group of the most eminent scholars and judges, whose collective opinion is entitled to more weight than the separate views of some of its members as individuals.[7]

4. The reasons for the privilege obviously apply to corporate as well as individual clients.[8] In a case involving the Louisville and Nashville Railroad Company, this Court stated (*United States v. Louisville and Nashville R. Co.*, 236 U. S. 318, 336 (1915)):

> . . . The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were

definition. Rule 26(1) declares that "The privilege available to the corporation or association terminates upon dissolution."

6. With respect to the Uniform Rules, Dean McCormick has stated that "A clear statement of the presently accepted scope of the privilege is embodied in the Uniform Rules." McCormick, *Evidence* (1954), p. 183.

7. The Reporter for the Model Code was Professor Morgan. The Committee on Evidence included Judges L. Hand, A. N. Hand, Patterson and Wyzanski, and Dean McCormick, and Dean Wigmore was Chief Consultant.

8. This was conceded by the District Court. (App. 28.)

counsel and would not exist but for the consultation. The lawyer-client communications are thus additional and secondary to evidence which would otherwise be available.[11]

Petitioner is thus completely in error in arguing that the attorney-client privilege enables corporations to "destroy the rulings of this Court that the privilege against self-crimination cannot be invoked by corporations" (Pet. 4-5) or "permit them to exercise all the powers of concealment that purportedly were taken from them when they were denied the privilege against self-crimination" (Pet. 6).

The inquiries to the lawyer and the disclosures accompanying them, are, as this Court recognized,[12] made in large part because, or on the assumption that, the privilege against disclosure exists. If what clients told their lawyers orally or in writing was subject to disclosure, the lawyer would be duty bound to advise the client in advance, and many such disclosures would in all probability never be made. Thus to destroy the privilege generally or as to corporations would have the effect of depriving persons of needed legal advice and of depriving society of the advantage of having persons act with knowledge of the law. It would not, however, in the long run result in more evidence being available.

11. "* * * the protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?,' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *City of Philadelphia* v. *Westinghouse Electric Corporation*, 205 F. Supp. 830, 831 (E.D. Pa., 1962).

12. *See United States* v. *Louisville & Nashville R. Co.*, 236 U.S. 318, 336, quoted at pp. 3-4, *supra*.

Petitioner attempts to support its position by asserting (Pet. 6), without any supporting reference, that "nullification of the privilege is to make 'impossible' the 'effective enforcement of . . . federal and state laws,' and more particularly the enforcement of the federal antitrust laws" against corporations. This Court can take notice of the absurdity of this overstatement.

The petitioner repeatedly seeks to give the impression that applying the privilege to corporations would be an extension or expansion of the law. Since the privilege has always been available to corporations as well as to other clients, this turns the picture topsy turvy.

There is no reason in logic or experience or policy for this Court now to re-examine the rule which it and all other courts have heretofore applied for over a century.

The petition for certiorari should, therefore, be denied.

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